

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:08-CR-155-F
No. 5:12-CV-230-F

KIMBERLY DENISE HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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ORDER

This matter is before the court on the Government's Withdrawal [DE-56] of its Motion to Dismiss [DE-54] Kimberly Denise Harris's pending Motion to Vacate, Set Aside or Correct her conviction and sentence [DE-51], pursuant to 28 U.S.C. § 2255. Harris, through counsel, asserts one claim. She contends that she is not guilty of having been a felon in possession of a firearm under 18 U.S.C. § 922(g), in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). Harris entered a plea of guilty to that offense without a plea agreement on July 5, 2009, *see* [DE-42], and was sentenced on October 6, 2009, to a term of 100 months, followed by a three-year term of supervised release. *See* Judgment [DE-46].

In response to Harris's § 2255 motion, the Government initially sought dismissal on grounds that her petition was untimely under the § 2255 one-year statute of limitations. However, the Government has withdrawn its Motion to Dismiss and states that it deliberately waives the statute of limitations defense in this case, acknowledging that Harris's conviction and sentence should be vacated. *See* Withdrawal [DE-56], p. 3. The court accepts the Government's position and its suggested remedy.

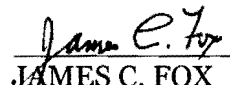
A review of her prior criminal record, in light of the ruling in *Simmons* and the content of the Government's Withdrawal [DE-56], together with the record in this case convinces the court that Harris in fact was and is "actually innocent" of the § 922(c) conviction. Because she

was not a "felon" at the time of that alleged offense under North Carolina law, as properly construed, an element of the § 922(g) offense was lacking.

In summary, the Government's Withdrawal [DE-56], and Harris's § 2255 motion [DE-51] are ALLOWED. The judgment of conviction and sentence, entered on October 6, 2009, [DE-46], hereby is VACATED. Kimberly Denise Harris is ORDERED to be released from federal custody, subject to pending detainers, if any.

SO ORDERED.

This, the 15th day of August, 2012.



JAMES C. FOX
Senior United States District Judge